91-1077

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

IN THE MATTER OF THE ESTATE OF

JOHN R. WEBSTER, Deceased;

GEORGE W. WILLIAMS, Executor,

Petitioner

v.

EDITH L. HARDY, AND

COOK COUNTY, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE ILLINOIS APPELLATE COURT

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QUESTIONS PRESENTED

Whether that portion of Chapter 110½, Section 4-6, Illinois Revised Statutes which voids a legacy of a Will to the spouse of a subscribing witness:

1. Violates the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution;

2. Violates Article One, Section Ten, Clause One of the United States Constitution, being a Bill of Attainder;

3. Violates the rights of those legatees similarly situated secured under Title 42 U.S.C. Section 1983.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Petitioner, George W. Williams, Executor in the estate of John R. Webster, deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate

Court upholding the constitutionality of Illinois Revised Statutes Chapter 110½, Section 4-6 of the Illinois Probate Act which voids a legacy to a person whose spouse subscribes as a witness to a will. The attack on Section 4-6 is based upon its violating the Due Process, Equal Protection, and Bill of Attainder provisions of the federal constitution, and Title 42 U.S.C. Section 1983, as discriminating against married persons.

ORDERS AND OPINIONS BELOW

The Order of the Circuit Court of Cook County, Illinois, Case No. 88 P 07867 and entered August 14, 1990, appears in Appendix E to this petition. The written opinion of the Illinois Appellate Court, Appeal No. 1-90-2605, entered on June 7, 1991, appears in Appendix C. The Order of the Illinois Supreme Court, Docket No. 72199, denying the petitioner leave to appeal, was entered on October 2, 1991, and appears in Appendix A.

JURISDICTION

The Opinion of the Illinois Appellate Court, filed June 7, 1991, affirming the order of the Cook County, Illinois, Circuit Court, entered August 14, 1990, appears as Appendices C and E respectively.

The order of the Illinois Supreme Court denying petitioner leave to appeal, dated October 2, 1991, appears as Appendix A. Appeals in the Courts of Illinois were perfected pursuant to Rules 301, 303, 315, 317 of the Illinois Supreme Court. Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1257. Title 28 U.S.C. Section 2403(b) may be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Section 1, Amendment XIV; Article 1, Section 10, Clause 1; 42 U.S.C. Section 1983, are all set forth in Appendix G.

STATEMENT OF THE CASE

John Robert Webster executed his Last Will and Testament on April 20, 1985, at Chicago, Illinois. In the Will, the testator left his entire estate to his spouse, Edythe Louise Webster, the natural mother of legatees Edith L. Hardy and Betty Hardy Williams, and maternal grandmother of Robert Bruce Williams, residuary legatee. Witnessing the execution of the Will were Muriel E. Williams, spouse of Robert Bruce Williams, and George W. Williams, the spouse of Betty Hardy Williams. No other person subscribed as a witness to the execution of the Will. Edythe Louise Webster predeceased the testator. Upon the death of the testator, June 21, 1988, probate of the decedent's estate was begun in the Circuit Court of Cook County, Illinois. Counsel representing legatee-respondent, Edith L. Hardy, argued that Section 4-6 of the Illinois

Probate Act invalidated the legacies to Betty Hardy Williams and Robert Bruce Williams because their respective spouses subscribed as witnesses to the execution of the Will and there were no other witnesses, required by the Statute, whose subscriptions would have saved the above legacies. The executor-Petitioner raised the issues of the Statute's violating Article 1, and Amendment XIV of the federal constitution, and Title 42 U.S.C. Section 1983 (Appendix F). The Illinois Circuit Court ruled, on August 14, 1990, that Section 4-6 of the Illinois Probate Act did not violate the federal constitution (Appendix E) and ordered distribution of estate's assets to respondent, Edith L. Hardy. Appeal of these rulings was perfected in the Illinois Appellate Court which, on June 7, 1991, affirmed the lower court decision (Appendix C). Petition for leave to appeal to the Illinois Supreme

Court was denied on October 2, 1991 (Appendix A). The federal questions sought to be reviewed were timely raised, briefed, and argued in the Illinois Appellate Court. These issues were likewise raised in the Petition for review to the Illinois Supreme Court (Appendices D, B).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for two reasons. First, certain of the constitutional and federal questions presented for review are those of first impression for this Court: an Illinois probate statute which, like those in the sister states of Kentucky, Massachusetts, New Hampshire, North Carolina, and West Virginia, regulate the execution of wills by placing disabilities upon married persons and only married persons. Second, the decisions and opinions of the Circuit Court of Cook County, Illinois, and the

Illinois Appellate Court, affirming and upholding the constitutionality of Section 4-6 of the Illinois Probate Act, are untenable and so in obvious conflict with the precedents of this Court that the issues cry out for further review and settlement of those important federal questions.

On August 14, 1990, the Circuit Court received arguments from the petitioner challenging the constitutionality and legality, under federal law, of Section 4-6. These contentions were summarily rejected and subsequently raised again in the Illinois Appellate Court.

The first issue presented before the Appellate Court was the assertion that Section 4-6 was a Bill of Attainder in violation of Article 1, Section 10, Clause 1, of the United States Constitution.

The Appellate Court's resolution of this issue was to simply hold that the

statute inflicted no "punishments," and equated the legislative disabilities imposed upon married persons by this statute to a regulatory statute that precludes the award of government contracts to people involved in the bribery of public officials. Bribery is a crime in the State of Illinois, but marriage is not. The accused briber is guaranteed a trial with legal and constitutional safeguards in a judicial forum and only upon an adjudication of guilt will legislative disabilities attach. Married persons, by virtue of Section 4-6, are presumed guilty of overreaching, duress, or coercion without benefit of such adjudication. This, the Constitution prohibits! Legal burdens should bear some relationship to individual responsibility or wrongdoing and the legislature cannot, by fiat, act as judge, jury, and executioner of married persons. Ex Parte

Garland, 4 Wall 333 (1867); United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946).

The second issue raised before the appellate court was the assertion that Section 4-6 creates a classification among persons between whom there are no real and substantial differences, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The appellate court in its opinion stated it would use the "rational basis" test in judging the constitutionality of Section 4-6. Reed v. Reed, 404 U.S. 71 (1971). The appellate court, however, failed to complete the constitutional analysis of the statute required by this Court in Trimble v. Gordon, et al., 430 U.S. 762 (1977). Statutory disability is placed only upon married persons, whereas relationships between witnesses and

legatees of equal or greater closeness are not encumbered, e.g. parent-child, brother-sister, lovers. The appellate court states that the policy of Section 4-6 is, inter alia, to deter fraud, overreaching, and undue influence. However, ".....the Equal Protection Clause requires more than the mere incantation of a proper state purpose." Trimble, id at 769. The rulings of this Court discussed above require the lower court to up-front address the relationship between the disabilities imposed on married persons by Section 4-6 and the promotion by the State of discouraging fraud, undue influence, and overreaching in the making of Wills. On this requirement the appellate court is silent. Discriminatory classifications without the guidelines of this Court are not saved because the statute provides a secondary or alternative means by which a married legatee whose spouse witnesses a

Will can take a gift. Such additional legislative hoops point to the invidious nature of the statute's discrimination against married persons, a criteria unrelated to the objective of the statute, Reed v. Reed, supra, at 229, is arbitrary, unreasonable, and unconstitutional. Lehnhausen v. Lake Shore Auto Parts Company, 410 U.S. 356 (1973).

The next issue presented to the appellate court was the assertion that Section 4-6 violates the procedural due process rights of certain legatees by imposing upon them disabilities without first providing them the opportunity to be heard in defense.

The appellate court finds no "protectable interest" of petitioner and those similarly situated under Board of Regents v. Roth, 408 U.S. 564 (1972). Ironically, the appellate court, prior to its discussion of this point of law, had set forth the public policy underlying

Section 4-6, i.e., the deterrence of wrongdoing in the execution of a Will by the assumption that a certain class of married person will, if given the opportunity, overreach. The Fourteenth Amendment to the Constitution, Due Process Clause, through the decisions of this Court, defined and recognized protected property interests in "reputation," "integrity," and "character." Schware v. Board of Examiners, 353 U.S. 232 (1956); Konigsberg v. State Bar of California, 353 U.S. 252 (1956). That public policy of Section 4-6 thus brands the class of legatee of whom petition is a member, with a tarnish to its integrity not encumbering others. What the Constitution giveth, Section 4-6 taketh away by its enforcement. Indeed, the State of Illinois, except the appellate court, recognizes reputation as a protected "liberty interest" requiring Due Process pro-

tection. Bromberg v. Whitler, 57 ILL. App. 3d 152 (1977).

The appellate court next "considered" the issue raised by petition that Section 4-6 creates an irrebuttable presumption of overreaching, duress, or undue influence without the requirement of proof. The appellate court, however, did not "confront" the issue. The common law of the State of Illinois defines those elements involved in the exercise of fraud, duress, and undue influence in the execution of a Will. Legislatively, only a certain class of legatee is below suspicion without the requirement, in a judicial forum, of any proof of wrongdoing. Furthermore, Section 4-6 does not provide a forum to rebut such a presumption. Elementary Due Process is lacking through and through. Having failed to conduct the constitutional analysis of Section 4-6 required by this Court in

v. Gordon, supra, there can exist no rational relationships between the objective of the statute and disabilities imposed, legislatively, upon married legatees. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

The Civil Rights Act, 42 U.S.C. Section 1983, is a remedial law that applies in this appeal to this petitioner. The fundamental federal rights of Due Process and Equal Protection of the Laws are those "interests" of which petitioner has been deprived through the enforcement of Section 4-6 by the courts. Where there exists a right, there exists a remedy. Petitioner's reputation, character, and integrity are also protected liberty interests cognizable under the Civil Rights Law which the courts are required to give a liberal construction. Gomez v. Toledo, 446 U.S. 635 (1980). The appellate

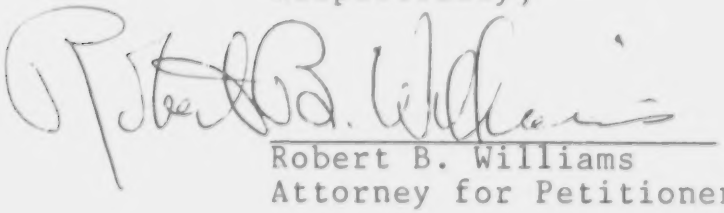
court chose to do everything but what it should have done in considering the last federal issue presented by the petitioner, i.e, stated the objective of the statute, found a rational basis for its application, and thereupon ended its discussion.

CONCLUSION

The petitioner, due to the blatant disregard for the rights of married persons by the Illinois Courts, such that affronts the conscience of a civilized society, respectfully requests that his Petition for Writ of Certiorari be granted to review and properly rule this case for the furtherance of justice and the preservation of the United States Constitution and the Civil Rights Act.

This 24th day of December, 1991.

Respectfully,



Robert B. Williams
Attorney for Petitioner

APPENDIX A

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, ILL. 62706
(217) 782-2035

October 2, 1991

Mr. Robert B. Williams
Attorney at Law
23 Birckhead Place
Toledo, OH 43608

No. 71299 - In the Matter of the Estate of John R. Webster, Deceased (George W. Williams, Exr., petitioner, v. Edith L. Hardy, et al., respondents). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1991.

APPENDIX B

IN THE ILLINOIS SUPREME COURT

IN THE MATTER OF THE ESTATE
OF JOHN R. WEBSTER,
Deceased; GEORGE W.
WILLIAMS, Executor-
Appellant,

v.

EDITH L. HARDY,

and

COUNTY OF COOK,

Appellees

APPEAL NO.

ILLINOIS APPELLATE COURT,
FIRST DISTRICT, FIFTH
DIVISION No. 90-2605

CIRCUIT COURT OF COOK
COUNTY
No. 88 P 07867

. . . . . .

PETITION FOR APPEAL AS A MATTER OF RIGHT, AND, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

. . . . . .

1. Now comes Robert B. Williams, Attorney at Law, on behalf of his appellant, George W. Williams, executor of the within estate who, pursuant to Rules 315

and 317 of this Court, petitions for appeal as a matter of right, and, in the alternative, for leave to appeal.

2. Judgment of the Appellate Court was rendered herein on June 7, 1991. Neither an affidavit of intent to seek review nor a petition for rehearing has been filed.

3. Appellant relies upon the following points in support of a reversal of the judgment of the Appellate Court. Section 4-6 of the Illinois Probate Act, on its face, and, as applied to the within Estate by the Circuit Court, is unconstitutional, to wit:

A. As a Bill of Attainder;

B. As creating a classification among persons between whom there are no real or substantial differences;

C. As violating the procedural due process rights of certain legatees by imposing upon them disabilities without first providing them the opportunity to be

heard in defense;

D. By creating an irrebuttable presumption of overreaching, duress, and undue influence respecting a class of legatee without the requirement of any proof of wrongdoing, or forum;

Further, said Section 4-6 is special legislation that unfairly distributes burdens and benefits no one, and, violates the provisions of the Civil Rights Act of 1871.

4. STATEMENT OF THE FACTS.

The Testator, John Robert Webster, executed his Last Will and Testament on April 20, 1985, at Chicago, Illinois. In his Will the Testator gave his entire estate to his spouse, Edythe Louise, the natural mother of legatees, Edith L. Hardy and Betty Hardy Williams, and maternal grandmother of Robert Bruce Williams, residuary legatee. All of the named legatees in the Will were, and are, the

Testator's closest family and the natural objects of his bounty. Witnessing the execution of the Will were Muriel E. Williams, spouse of Robert Bruce Williams, and George W. Williams, the spouse of Betty Hardy Williams. No other person subscribed to the execution of the Will. Edythe Louise Webster preceded her spouse in death. During probate proceedings the Circuit Court of Cook County ruled in favor of appellee, Edith L. Hardy and held that Section 4-6 of the Illinois Probate Act invalidated the legacies to Betty Hardy Williams and Robert Bruce Williams; that the testator's intent was to create a class gift of whom Edith L. Hardy was the only survivor and ordered distribution of estate's assets in accordance therewith. From this judgment, the Executor herein filed his appeal.

5. Appeal as a matter of right to this Court lies due to the fact that this is a

case of first impression involving the constitutionality of Section 4-6 of the Illinois Probate Code, upheld by the decision of the Appellate Court, Rule 317. For this reason alone, the general importance of the constitutional questions presented makes this appeal worthy of review. Review of this matter is further warranted, by leave of this Court, because this appeal brings into focus legislation that treats a certain class of person as uniquely second class, viz. a statute that is fundamentally unfair in all aspects of those specifics enumerated in paragraph three (3), above. Board of Regents -v- Roth, 408 U.S. 564, 33 L.Ed 2d 548, 92 S/Ct 2701 (1972); Cleveland Board of Education -v- LaFleur, 414 U.S. 632, 39 L.Ed 2d 52, 94 S/Ct 791 (1974); Trimble -v- Gordon, et al., 430 U.S. 762, 52 L.Ed 2d 31, 97 S/Ct 1459 (1977), and other authorities too numerous to be set forth

in this Petition all argue for reversal of the Appellate Court's decision.

Respectfully submitted,

S/ Robert B. Williams

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APPENDIX C

Fifth Division
June 7, 1991

NOTICE
The test of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing of the disposition of the same.

No. 1-90-2605

IN THE MATTER OF THE ESTATE OF
JOHN R. WEBSTER, Deceased,
GEORGE W. WILLIAMS,

Executor-Appellant,

v.

EDITH L. HARDY,

Legatee-Appellee,

and

STATE OF ILLINOIS,

Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
JEFFREY A. MALAK,
JUDGE PRESIDING.

JUSTICE MURRAY delivered the opinion of the court:

This action was filed in the circuit court of Cook County, Illinois for probate of the will of John R. Webster, and for distribution of the testator's assets thereunder. The circuit court ruled that the legacy to Betty Hardy Williams, testator's stepdaughter, and the contingent residuary legacy to Robert Bruce Williams, testator's stepgrandson, both lapsed pursuant to section 4-6 of the Illinois Probate Act (Probate Act), and that the testator's estate should pass in its entirety to his other stepdaughter, legatee Edith L. Hardy. The executor of the estate, George W. Williams, appeals the order of the Probate Court of Cook County distributing the assets of the estate.

The executor appeals the court's order contending that the provision of the Probate Act providing for the lapsing of the stepgrandson's legacy is unconstitutional

as well as violative of the Civil Rights Act of 1871. The State's Attorney of Cook County has filed a brief contending that the executor's arguments are without merit. At issue is a provision of the Probate Act which makes void a legacy to a person or his or her spouse who attests to a will unless the will is otherwise duly attested by a sufficient number of witnesses provided by the Probate Act. Ill. Rev. Stat. 1989, ch. 110 1/2, par. 4-6.

The pertinent provision of the disputed section of the Probate Act reads as follows:

"(a) If any beneficial legacy or interest is given in a will to a person attesting its execution or to his spouse, the legacy or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of

witnesses as provided by this Article exclusive of that person and he may be compelled to testify as if the legacy or interest had not been given, but the beneficiary is entitled to receive so much of the legacy or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established." Ill. Rev. Stat. 1989, ch. 110 1/2, par. 4-6(a).

The facts in this case are undisputed:

Edythe Louis Webster predeceased her spouse, John R. Webster. The will of John Webster was admitted to probate in 1988. It provided, among other things, that in the event his spouse predeceased him all his property would go to his stepdaughters, Edith L. Hardy and Betty Hardy Williams. Should only one stepdaughter survive him and his spouse all the property should go to the surviving stepdaughter. The will also provided that all the

property not otherwise effectively disposed of by the will go to his stepgrandson Robert Bruce Williams.

Attesting the will were two witnesses: (1) George W. Williams, the husband of Betty Hardy Williams, and (2) Muriel E. Williams, the wife of stepgrandson Robert Bruce Williams. George Williams was named executor of the estate. He was unable to receive a fee under section 4-6 of the Probate Act due to the fact that he had also served as an attesting witness. Edith Hardy claimed that the legacies were void under the aforecited section of the Probate Act and that Webster's intent was to create a class gift to his two stepdaughters. The County contended that the legacies to Betty and Robert Williams lapsed under the terms of the Probate Act and the lapsed legacies should be distributed to Webster's heirs. The trial court ruled that the legacies did lapse and that

Webster intended to create a class gift to his stepdaughters Edith Hardy and Betty Williams. Consequently, the trial court ordered the entire legacy go to Edith Hardy, the sole survivor of that class. The executor asserted that the aforecited section of the Probate Act was unconstitutional. The trial court rejected the executor's argument. Subsequently, the executor filed this timely appeal.

For the following reasons we affirm the decision of the trial court.

The executor raises the following arguments in support of his contention that section 4-6 of the Illinois Probate Act is, on its face, and, as applied to the estate of John R. Webster by the circuit court unconstitutional:

(1) Section 4-6 is a Bill of Attainder;

(2) Section 4-6 creates a classification among persons between whom there are no real and substantial differences;

(3) Section 4-6 creates a "suspect" classification which unreasonably, arbitrarily, and individually discriminates against the marital relationship;

(4) Section 4-6 violates the procedural due process rights of certain legatees by imposing upon them disabilities without first providing them the opportunity to be heard in defense;

(5) Section 4-6 creates an irrebuttable presumption of overreaching duress, or undue influence respecting a class of legatee without the requirement of any proof of wrongdoing, or forum; and

(6) Section 4-6 is special legislation, a regulatory law that unfairly distributes burdens and benefits to no one.

The executor further argues that section 4-6 violates the Civil Rights Act of 1871.

I

First, the claim that section 4-6 of the Probate Act is a bill of attainder is

without merit. Article 1, section 10 of the United States Constitution prohibits a state from, among other things, passing any bill of attainder. "Bills of attainder are legislative acts inflicting punishment on certain persons without judicial trials." Pickus v. Board of Education (1956), 9 Ill. 2d 599, 611, 138 N.E. 2d 532.

The section of the Probate Act attacked does not punish anyone without a trial, it merely regulates the drafting of wills. It is more akin to the regulation of governmental contracts by precluding the award of such contracts to people involved in the bribery of public officials. Such regulatory acts are not bills of attainder. (Polyvend Inc. v. Puckorius (1979), 77 Ill. 2d 287, 395 N.E. 2d 1376). The fact that a statute is narrowly focused does not make it a bill of attainder if it does not inflict punishment without

judicial trial. (People v. Gurell (1983), 98 Ill. 2d 194, 456 N.E. 2d 18.) The section attacked does not punish step-children or their spouses, it merely provides for a regulation as to proper attestors to a will. If the will had been attested to by two disinterested persons unrelated by marriage to the legatees, their gifts would not have lapsed. Section 4-6 of the Illinois Probate Act is not a bill of attainder.

II

The executor's argument that section 4-6 of the Probate Act creates an unconstitutional classification is also without merit. The basis for this argument appears to be that the Probate Act singles out witnesses having a marital relationship with a legatee and disregards and ignores other relationships such as live-ins and lovers. There is no prohibition against classifying by the legislature

unless there is no rational basis for the classification. The statute under attack does not preclude spouses of stepdaughters or stepgrandsons from inheriting or from being a beneficiary of a will. It merely regulates the witnessing of a will to prevent or deter fraud and undue influence Smith v. Goodell (1913), 258 Ill. 145, 101 N.E. 255.

A statutorily valid will must be attested to by at least two credible people. (Ill. Rev. Stat. 1989, ch. 110 1/2, par. 4-3). The expression "credible" witness means competent witness. (Scott v. Couch (1915), 271 Ill. 395, 111 N.E. 272.) The test of interest affecting one's competency as a witness to a will is whether he will gain or lose pecuniarily thereby. (Jones v. Grieser (1909), 238 Ill. 183, 87 N.E. 295.) Attesting witnesses are regarded as persons placed around the testator in order that no fraud

may be practiced upon him in the execution of the will and to judge his capacity. (In re Estate of Weaver (1977), 50 Ill. App. 3d 223, 365 N.D. 2d 1038, 1044; Smith v. Goodell (1913), 258 Ill. 145, 101 N.E. 255.) Not only a legatee, but also a person named as executor or trustee is prevented from attesting to a will (see Fearn v. Postlewaite (1909), 240 Ill. 626, 88 N.E. 1057.) The law favors admission of a will to probate in order that administration of estate may proceed, but requirements of the statute are mandatory and must be complied with. Ill. Rev. Stat. 1989, ch. 110 1/2, par. 6-7(a).

The statute must be applied such that if the will is duly attested by two credible, disinterested witnesses, then the witnesses who have an interest under the will may take. (In Re Estate of Watts (1979), 67 Ill. App 3d 463, 384 N.E. 2d 589.) The policy of the statute is not to

deny the right of spouses or others to attest the will, but rather it is to require two credible witnesses to prevent attesting witnesses from bootstraping the interests of one another. (In Re Estate of Watts (1979), 67 Ill. App. 3d 463, 465, 384 N.E. 2d 589, 590.) The objective of the legislation is the assurance of the credibility of witnesses to a will. Further, section 4-6 provides a vehicle whereby a will may still be upheld as valid even if the will gives an attesting witness an interest. Thus, we conclude that the classification is proper and not constitutionally defective.

III

Third, the executor argues that the statute creates a suspect classification which unreasonably, arbitrarily and invidiously discriminates against marital relationships. This argument is also without merit.

In considering this questions, we must first define the proper test to be applied to the challenged legislation. At oral arguments appellant conceded that the appropriate test was something less than strict judicial scrutiny, but maintained that the appropriate test was more than the rational basis test. The county, on the other hand, claims that the statute in question does not involve a suspect classification in that it is not premised upon race or national origin, nor is any fundamental right involved, therefore, the rational basis test should apply in determining whether equal protection has been violated in creating the classification.

Suspect classes are classifications created along lines of race or national origin. (Trimble v. Gordon (1977), 430 U.S. 762, 52 L. Ed. 2d 31, 97 S. Ct. 1459.) Strict judicial scrutiny will only be imposed when a classification is based on a suspect trait. (Mathews v. Lucas

(1976), 427 U.S. 495, 49 L. Ed. 2d 651, 96 S. Ct. 2755.) In matters relating to economics or social welfare, the proper test in determining whether a classification violates the Equal Protection clause is whether the classification is reasonable and whether it has a fair and substantial relation to the object of the legislation so that all persons similarly situated are treated alike. (Reed v. Reed (1971), 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251.) Thus, the standard for review regarding the constitutionality of section 4-6 is whether there is some retional basis for the different treatment of witnesses whose spouses are legatees under the will and whether that treatment is related to a legitimate State objective.

Illinois courts have held that the spouse of a legatee or devisee under a will is not a competent attesting witness to that will. (Sloan v. Sloan, (1900), 184

Ill. 579, 56 N.E. 952; Fearn v. Postlewaite (1909), 240 Ill. 626, 88 N.E. 1057.) The statute at issue does not invidiously discriminate against anyone. Discrimination between husband and wife in the role of a witness has been the law since the common law was adopted. For example in criminal cases, with limited exceptions, a husband and wife were incompetent to testify for or against each other. (People v. Palumbo (1955), 5 Ill. 2d 409, 125 N.E. 2d 518.) The disqualification was rested in part upon their interest, in part upon the common law notion of the unity of a husband and wife, and in part upon a desire to promote domestic tranquality. (People v. Palumbo (1955), 5 Ill. 2d 409, 412-13, 125 N.E. 2d 518.) Although this rule is largely relaxed today, some semblence of it still remains in our Illinois Code of Civil Procedure. (See Ill. Rev. Stat. 1989, ch.

110, par. 8-801.) Moreover, the statute at issue does not preclude a husband a wife from acting as a witness to his or her parents or stepparents will, it merely provides that if one does witness the will and there are insufficient competent or disinterested witnesses, his or her legacy is lapsed.

The Probate Act further supports the idea that the marital relationship is unique. In the event of the death of one's spouse, a surviving spouse is always entitled to receive a portion of the testator's estate. Whether or not a will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant, or 1/2 of the entire estate if the testator leaves no descendant. (Ill. Rev. Stat. 1989, ch. 110 1/2, par. 2-8(a).) No

individual other than a surviving spouse is always entitled to receive a portion of a testator's estate.

Classifications are not per se unconstitutional. Their constitutionality depends upon the character of the classification and its relation to legitimate legislative aims. (Mathews v. Lucas (1976), 427 U.S. 495, 49 L. Ed. 2d 651, 96 S. Ct. 2755.) The Equal Protection Clause of the Fourteenth Amendment does not deny the State the power to treat separate classes of persons differently. The clause only prohibits states from legislating different treatment to classes of persons based on criteria wholly unrelated to the objective of that statute. (Eisenstadt v. Baird (1972), 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029.) Nothing in the record suggests that the Probate Act is only applied to a certain class of people based on their race, creed, or origin, by its terms, the

Probate Act applies to all persons similarly situation, i.e. legatees and/or their spouses.

Relationship of a husband and wife is a unique relationship granted privileges by our society. As a result of the desire to promote that relationship, public policy dictates that spouses are not viewed as competent witnesses to attest to the execution of a will in which their spouse is to receive an interest. The right to make a will, and the right to take property under a will exist only by virtue of the statutes, and are entirely subject to their provisions. (Robertson v. Yager (1927), 327 Ill. 346, 158 N.E. 709.) Nothing in the Probate Act precludes legatees or their spouses from taking under a will, the Probate Act merely provides that a will must be properly attested by two credible witnesses. In this case, the will was not attested by two disinterested witnesses as required by

the statute, consequently, the interests of Betty Hardy Williams and Robert Bruce Williams were properly found to be void by the trial courts.

IV

Fourth, the executor argues that section 4-6 of the Probate Act violates the procedural due process rights of certain legatees by imposing upon them disabilities without first giving the legatees an opportunity to be heard in defense. This argument also lacks merit. The starting point in any due process analysis is a determination of whether a protectable interest is present, for if there is not, no process is due. Polyvend v. Puckorius (1979), 77 Ill. 2d 287, 294, 395 N.E. 2d 1376.

"It is fundamental that the constitutional guarantees of procedural due process only become operative where there is an actual or threatened impairment of deprivation of 'life, liberty or

property.'" (Polyvend v. Puckorius (1979), 77 Ill. 2d at 293-94, 395 N.E. 2d 1376; U.S. Const., amend. XIV; Ill. Const. 1970, art. I, Sec. 2.) Procedural due process safeguards are triggered only when the property rights have vested. (Board of Regents v. Roth (1972), 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701.) The supreme court concluded in Roth, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2709.) In other words "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." (Roth, 408 U.S. at 576, 33 L. Ed 2d at 560, 92 S. Ct. at 2708.) A legacy under a

will is not a vested property right, it is a future interest. Section 4-6 of the Probate Act does not violate the procedural due process rights of any legatee.

V

Fifth, the executor charges that section 4-6 creates an irrebuttable presumption of overreaching, duress, or undue influence without the requirement of proof. The requirement creates no such presumption. It merely relates to the ability of a witness to testify and subsequently, his or her spouse's right to receive a legacy under the will. In this respect it is not different that the Illinois Dead-Man's Act. (Ill. Rev. Stat. 1989, ch. 110, par. 8-201.) That Act, often attacked, and with many exceptions, disqualifies the testimony of a person as to conversations with a deceased, or to any event which took place in the presence of the deceased.

VI

The next attack on the legislation is that the statute is special legislation that unfairly distributes burdens and benefits. A regulatory measure classifying persons or objects will be upheld if there is a reasonable basis for the differentiation. (Yellow Cab Co. v. Jones (1985), 108 Ill. 2d 330, 483 N.E. 2d 1278.) Here the basis of the legislation is the prevention of fraud or duress in the execution of a will. As previously pointed out that is a rational basis sufficient to overcome the charge of special legislation or unfair classification.

The standards used in determining an equal protection challenge are to be utilized in determining a challenge to the statute under the special legislation provisions of our constitution, and a statute challenged as special legislation will be upheld if the differentiation it makes

between similarly situated persons bears a rational relationship to a legitimate legislative purpose. (People v. Gurell (1983), 98 Ill. 2d 194, 206, 456 N.E. 2d 18; see also Illinois House Development Authority v. Van Meter (1980), 82 Ill. 2d 116, 124, 412 N.E. 2d 151; Anderson v. Wagner (1979), 79 Ill. 2d 295, 314, 402 N.E. 2d 560; S. Bloom, Inc. v. Mahin (1975), 61 Ill. 2d 70, 76-77, 329 N.E. 2d 213.) The special legislation section of the Illinois constitution allows differentations between similarly situated persons if the classification bears a rational relationship to a legitimate legislative purpose. (Illinois House Development Authority v. Van Meter (1980), 82 Ill. 2d 116, 124, 412 N.E.2d 151, citing Anderson v. Wagner (1979), 79 Ill. 2d 295, 315, 402 N.E. 2d 560.) We held above that the legislation has a rational relationship to a legitimate State purpose, therefore we find that section

4-6 of the Probate Act does not constitute special legislation.

Finally, the executor contends that the legislation violates the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983 (1989)), in that it stripes legatees married to persons who witness the execution of a will of their protected liberty and property interests. He cites no case law in support of this proposition; obviously none could be found.

Section 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C. Sec. 1983 (1989)).

Two allegations must be made to state a claim under that provision. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (Gomez v. Toledo (1980), 446 U.S. 635, 640, 64 L. Ed. 2d 572, 577, 100 S. Ct. 1920, 1923.) The executor has not properly stated a cause of action, nor do we believe that any exists for a violation of Civil Rights.

The purpose of the legislation is to prevent fraud. Since the legislation has a rational basis and it applies to all persons similarly situated, it violataes neither the Civil Rights legislation, equal protection, nor any other consti-

tutional provisions the mind of an imaginative lawyer can conjure.

A statute is presumed valid, and the burden is on the party challenging its validity to prove that it is unconstitutional. (Scott v. Department of Commerce & Community Affairs (1981), 84 Ill. 2d 42, 50, 416 N.E. 2d 1082; Jaris v. Public School Teacher's Pension and Retirement Fund (1974), 58 Ill. 2d 15, 19, 317 N.E. 2d 51.) In our judgment that burden has not been met. No matter how harsh the result may seem in the instant case, the statute at issue was enacted to prevent fraud, and we find that the statute is constitutional.

The record reflects that John Webster and his wife, Edythe, executed their wills at the same time. Four witnesses were present. Rita Bell Phelps and Martha B. Boles signed the will of Edythe Webster, while Muriel Williams and George Williams signed the will of John Webster. It is

unfortunate that the spouses of Webster's legatees were the attesting witnesses to John Webster's will, for if Rita Bell Phelps and Martha B. Boles had also attested to John Webster's will, neither Edith Williams' nor Robert Williams' legacy would have lapsed. This unfortunate scenario stresses the important of carefully choosing the attesting witnesses to a will. We note, although we cannot dictate anyone's moral duty, nothing contained in our laws or this opinion prohibits Edith Hardy from following the wishes of her deceased parents.

Accordingly, for the reasons set forth above, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

GORDON, J., and McNULTY, J., concur.

APPENDIX D

APPEAL TO THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT FROM THE
CIRCUIT COURT OF COOK COUNTY

IN THE MATTER OF THE ESTATE OF JOHN R. WEBSTER, Deceased GEORGE W. WILLIAMS, Executor-appellant.	No. 88 P 07867 Docket 951 Page 308

NOTICE OF APPEAL

George W. Williams, executor of the will of John R. Webster, appeals from the judgment of the Circuit Court of Cook County entered by Judge Jeffrey A. Malak on August 14, 1990, denying the executor's petition to hold unconstitutional Section 4-6 of the Illinois Probate Act and holding that Section 4-6 does not violate the constitutions of the United States or of Illinois. The executor seeks reversal of the judgment of the Circuit Court, and a holding that Section 4-6 of the Illinois

Probate Act is unconstitutional in voiding a legacy to a legatee whose spouse is a witness to a will.

S/George W. Williams

George W. Williams
1115 S. Plymouth Court
201
Chicago, IL 60605
(312) 939-1097

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ESTATE OF
JOHN R. WEBSTER,

Deceased,

No. 88P 07867

Docket 951

Page 308

ORDER

UPON DUE NOTICE, UPON THE EXECUTOR'S PETITION AS TO THE CONSTITUTIONALITY OF ILLINOIS REVISED STATUTES CHAPTER 110½ SECTION 4-6, AND UPON THE EXECUTOR'S WRITTEN ARGUMENT AND THE ORAL ARGUMENTS OF COUNSEL, AND THE COURT BEING FULLY ADVISED IN THE PREMISES AND HAVING RENDERED AN ORAL OPINION, IT IS ORDERED THAT:

1. THE EXECUTOR'S PETITION IS DENIED.

2. THE COURT HOLDS THAT THE FOREGOING STATUTE DOES NOT VIOLATE THE UNITED STATES OR ILLINOIS CONSTITUTIONS.

3. THERE IS NO JUST CAUSE FOR SUSPENSION OR DELAY IN THE ENFORCEMENT OF THIS ORDER.

ENTER:

August 14, 1990

JEFFREY A. MALAK, Judge

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

APPENDIX F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS - COUNTY DEPARTMENT, PROBATE DIVISION

IN THE MATTER OF THE ESTATE OF

JOHN R. WEBSTER,

Deceased.

NO. 88 P 07867
Docket 951
Page 308

ARGUMENT IN BEHALF OF THE EXECUTOR IN SUPPORT OF THE PETITION TO DECLARE UNCONSTITUTIONAL THE PROVISION OF THE PROBATE ACT VOIDING A LEGACY TO A WITNESS'S SPOUSE

In the firm conviction that it is the duty of the executor to attempt in every lawful way to uphold the provisions of the will, the executor submits this brief argument in support of his position that

section 4-6 of the Illinois Probate Act is unconstitutional in the voiding of legacies to the spouse of the witness to the will.

1. The statute is a regulatory statute which benefits no class of persons. It is elementary that any regulatory statute (such as zoning statute, a motor vehicle code, a consumer product statute, and the like) must benefit a defined class of persons. There is no class that is benefited by this statute. It does not benefit testators or legatees or even the general public.

2. The statute has no rational purpose. It has sometimes been considered that the statute is intended to reduce undue influence in the making of wills, but there is no rational connection between the statute and any beneficial purpose. The statute causes serious losses to testators whose intentions are thwarted by the highly technical provision that the

testator's legacy is voided if the witness is the spouse of a legatee. It severely injures innocent legatees who have no connection with the witnessing of a will or even awareness of the witnessing. It causes indirect losses to the witness who is the spouse of a legatee and who is not called upon to be aware in any way of the contents of a will.

3. The statute is unreasonable and unconstitutional because it is ineffective. It requires no evidence of undue influence and bears no rational relationship to the fact of undue influence.

4. The statute is unconstitutional because it makes an unreasonable classification. It singles out witnesses having a marital relationship with a legatee, and disregards all other relationships between witnesses and legatees of equal or greater closeness. It ignores relationships between the legatee and the legatee's child, the legatee and the legatee's parent, the

legatee and the legatee's lover whether heterosexual or homosexual and whether of long duration or short. It ignores the relationship between employer and employee. It is a wholly unreasonable classification.

5. The statute is a discriminatory statute against the marital relationship. The courts have protected the marital relationship, but this statute discriminates against it, and discriminates against a legatee solely on the basis of the marital relationship. Moreover the other sections of the statute expressly discriminates in favor of the relationship of attorney and client, fiduciary and testator, and creditor and testator. An attorney, no matter how great his influence over the testator, is expressly permitted to act as fiduciary and to receive compensation as attorney for the fiduciary regardless of how great the provision for compensation. No fiduciary corporation is penalized for

attesting the will through its employees, partners, or shareholders. A creditor is expressly permitted to attest a will which charges real estate with the creditor's debt against the testator. The statute is unreasonably discriminatory on its face.

6. The statute unconstitutionally creates an irrebuttable presumption of duress or undue influence. It is comparable with a bill of attainder. The case law of our state has prescribed in detail just what constitutes duress or undue influence in the execution of a will, but section 4-6 creates an irrebuttable presumption if the witness is the spouse of a legatee, even though there is no evidence whatsoever of any undue influence or duress.

The executor submits that the statute in question denies equal protection of the laws and deprives a legatee of a legacy without due process of law. It also deprives the estate of the decedent of

proper distribution of the estate without due process of law. The statute provides in section 8-1(e) that, "it is the duty of the representative to defend a proceeding to contest the validity of the will." In this estate there has been a contest as to the validity, not of the entire will, but of a specific legacy intended by the decedent to benefit a named legatee. The statute has long been applied without any question having been raised as to its constitutionality. It is the executor's contention that its unconstitutionality is palpable and evident, and should now be declared by this Court.

Respectfully submitted,

_____
George W. Williams

DEPRES, SCHWARTZ &
GOEGHEGAN

by_____
Leon M. Depres, Attorneys
for the executor

DESPRES, SCHWARTZ & GOEGHEGAN - 70814
77 W. Washington - 711, Chicago IL 60602-
2985 (312) 372-2511

APPENDIX G

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

U.S. Const., Amendment 14.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

42 U.S.C. Sec. 1983.

NO STATE SHALL ENTER INTO ANY TREATY, ALLIANCE, OR CONFEDERATION; GRANT LETTERS OF MARQUE AND REPRISAL; COIN MONEY; EMIT BILLS OF CREDIT; MAKE ANY THING BUT GOLD AND SILVER COIN A TENDER IN PAYMENT OF DEBTS; PASS ANY BILL OF ATTAINDER, EX POST FACTO LAW, OR LAW IMPAIRING THE OBLIGATION OF CONTRACTS, OR GRANT ANY TITLE OF NOBILITY.
U.S. CONST., Art. 1, Sec. 10, Cl. 1

APPENDIX H

SECTION 4-6. BENEFICIARY OR CREDITOR AS WITNESS

(a) If any beneficial legacy or interest is given in a will to a person attesting its execution or to his spouse, the legacy or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of witnesses as provided by this Article exclusive of that person and he may be compelled to testify as if the legacy or interest had not been given, but the beneficiary is entitled to receive so much of the legacy or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established.

(b) No individual or corporation is disqualified to act or to receive compensation for acting in any fiduciary capacity with respect to a will of a decedent by reason of the fact that any employee or partner of such individual or any employee or shareholder of such corporation attests the execution of the will or testifies thereto. No attorney or partnership of attorneys is disqualified to act or to receive compensation for acting as attorney for any fiduciary by reason of the fact that the attorney or any employee or partner of the attorney or partnership attests the execution of the will or testifies thereto.

(c) If real or personal estate is charged with any debt by a will and the creditor may testify to its execution.

P.A. 79-328, Sec. 4-6, eff. Jan. 1, 1976.

APPENDIX I

LAST WILL AND TESTAMENT

--OF--

J O H N R O B E R T W E B S T E R

I, JOHN ROBERT WEBSTER, having attained the age of majority, residing at 3550 South Rhodes Avenue, City of Chicago, County of Cook, State of Illinois, and being of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence of any person, declare this to be my last will and testament, hereby revoking and cancelling all previous wills and codicils made by me.

ITEM I I direct that my funeral and burial be conducted in Chicago, Illinois.

ITEM II I direct that all my enforceable legal debts and funeral expenses be paid out of my estate as soon as convenient after my death.

ITEM III I am married. My wife's name is Edythe Louise Webster. All references in this Will to my "spouse" or my "wife" are to her.

ITEM IV I give all my property, real, personal, or mixed, in fee simple, to my spouse, should she survive me.

ITEM V In the event my spouse does not survive me, I give, devise, and bequeath, all my property, in fee simple, to my stepdaughters, Edith L. Hardy, and Betty Hardy Williams, both being residents of Chicago, Illinois. PROVIDED, HOWEVER, that should only one stepdaughter survive me and my spouse, I give all my property to that surviving stepdaughter.

ITEM VI All the rest, residue and remainder of my estate, of whatsoever kind and nature, and wheresoever situated, of which I may be seized or possessed or to which I may be entitled at the time of my death, not hereby otherwise effectively disposed of, I give, devise and bequeath, in fee simple, to my step-grandson, Robert Bruce Williams.

ITEM VII I hereby nominate Robert Lester Webster, of Chicago, Illinois, as the executor of this, My Last Will and Testament, and request the appointment of my aforesaid executor by the appropriate probate court, in any jurisdiction, without the requirement of any bond. Should my aforesaid nominee be unable or unwilling to serve as my executor, then, and in such event, I request the appointment of George W. Williams, of Chicago, Illinois, as my executor. I give and grant to my aforesaid fiduciary the full power and authority to sell or dispose of any assets constituting my estate, for such price, and upon such terms and considerations as to him shall seem fitting and proper. I also give to my aforesaid fiduciary the right to settle or compromise any claim existing for or against my estate, and to fulfill any contract obligation in which I may be involved at the time of my death, all without the necessity of obtaining the authorization of the probate court or any other court therefore.

IN WITNESS WHEREOF, I have on this 20th day of April, 1985, at Chicago, Illinois, signed my name at the end of this Instrument, consisting of two (2) pages, which I declare to be my Last Will and Testament.

S/John Robert Webster
John Robert Webster

The foregoing instrument was signed by the said John Robert Webster in our presence and was by him published and declared to be his Last Will and Testament, and we, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses this 20th day of April, 1985, at Chicago, Illinois.

S/Muriel E. Williams residing at

23 Birckhead Pl., Tol. OH 43608

S/George W. Williams residing at

1115 S. Plymouth Ct., Chg.Ill. 60605

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

October Term, 1991

No._____

GEORGE W. WILLIAMS, Executor in the Estate of JOHN R. WEBSTER, Deceased,

Petitioner,

-vs-

EDITH L. HARDY, and

COOK COUNTY, ILLINOIS,

Respondents.

PROOF OF SERVICE

This is to certify that on this 24th day of December, 1991, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's Counsel, and on every other person required to be served by depositing an envelope containing the above documents with the United States Post Office, properly

addressed to each of them and with first class postage pre-paid affixed thereon with return receipt.

The names and addresses of those served are as follows:

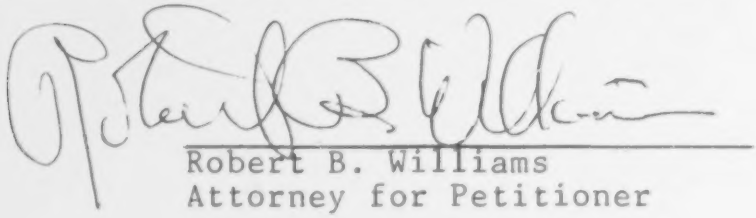
1. SUPREME COURT OF THE UNITED STATES: Attention: Clerk; 1 First Street, N.E.; Washington, D.C. 20543.

2. Attorney General, State of Illinois; Civil Appeals Division, 100 W. Randolph Street, 12th Floor, Chicago, Illinois 60601, Counsel for the State of Illinois; Tel. (312) 814-3000.

3. Sheila Pride-Threlkeld, Esq., Assistant Cook County, Illinois State Attorney, 500 Richard J. Daley Center, Chicago, Illinois 60602; Counsel for Respondent, Cook County, Illinois; Tel. (312) 443-4327.

4. Michael Papierski, Esq., Michael H. Lurie, Ltd., Attorneys at Law, 30 North LaSalle Street, Ste. 2630, Chicago, Illinois 60602, Counsel for Respondent,

Edith L. Hardy; Tel. (312) 236-3380.



Robert B. Williams
Attorney for Petitioner